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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 12

RAFAEL CORTES, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF VICTOR MANUEL SANTIAGO, DECEASED, PETITIONER,

against

BALTIMORE INSULAR LINE, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinion Below.

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 187) is reported in 52 F. (2d) 22.

Jurisdiction.

The jurisdiction of the Court rests upon Section 240 (*a*) of the Judicial Code, Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered on August 4, 1931 (R. 193). A petition for

a rehearing was denied by the Circuit Court of Appeals by an order entered December 10, 1931 (R. 202). Petition for certiorari was filed March 2, 1932, and was granted on April 11, 1932 (R. 202).

Question Presented.

The question presented is whether or not a cause of action arises under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. § 688) (hereinafter called the "Jones Act"), for the death of a seaman resulting from the failure of a ship's officers to provide proper medical treatment and their negligent performance of other acts, thereby failing to check a curable illness which was contracted by the seaman without fault attributable to the ship or crew.

The answer depends on whether or not such neglect, although a "personal injury" within the meaning of Section 33 of the Merchant Marine Act of 1920, can be deemed "negligence" within the meaning of the Employers' Liability Act of April 22, 1908, which by incorporation into the Jones Act is made applicable to seamen.

Statutes Involved.

Section 33 of the Jones Act provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway

> employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

The relevant statute, modifying or extending the common-law right or remedy in cases of personal injury to railway employees, and conferring or regulating the right of action for death of railway employees, referred to in the Jones Act, is the Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65, 45 U. S. C. A. §§ 51, *et seq.*). Section 1 of this statute provides as follows:

> "Every common carrier by railroad while engaged in (interstate) commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of this statute provides as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall

be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *."

Statement.

In October, 1928, petitioner's intestate, Victor Manuel Santiago, was a seaman on board the Steamship *Delisle* (R. 8, 117), owned and operated by respondent (R. 2, 5). On October 16, 1928, the *Delisle* left Boca Grande, Florida, and proceeded north along the coast, arriving at Carteret, New Jersey, on October 22, 1928 (R. 9, 130).

On leaving Boca Grande, Santiago became ill (R. 10). He was dangerously sick during the entire voyage north (R. 11, 17, 43, 168). After the vessel reached Carteret, he was removed to the Staten Island Marine Hospital where his condition was diagnosed as lobar pneumonia, with consolidation on both side (R. 54). He died at 8:45 A. M. on October 23, 1928 (R. 58).

Although Santiago was seriously sick on October 17, 1928, the chief mate forced him to work until about noon-time that day (R. 11). The ship had a hospital room (R. 105), but Santiago was kept in the sailors' quarters in the forecastle, which were damp, cold, unsanitary and equipped with insufficient bedding (R. 12-15, 32, 35, 38-39). No seaman was assigned to take care of him (R. 115) and the master personally did nothing for him (R. 103-104). The chief mate admitted he did not give medicine to Santiago (R. 113). The only testimony in the case which indicates that any care was given to Santiago is that of the third mate who said he gave him quinine and physics (pills)

twice a day (R. 124) and of the steward who said he gave Santiago a dose of oil in the morning and epsom salts in the afternoon (R. 158).

Although the ship went north along the coast a great part of the trip, Santiago was not put ashore. The steamer dropped anchor in the Raritan River on October 21st at 6:35 P. M. and remained there until the following morning at 6:00 (R. 112), but no medical assistance was sought or obtained. When the vessel arrived at Carteret at 8:20 A. M., no physician or anybody else was summoned to assist Santiago (R. 130). The Marine Hospital did not receive the call for an ambulance until 3:00 P. M. on that day (R. 60). The patient was reached at 4:20 and admitted to the hospital at 5:45 P. M. (R. 60).

Petitioner brought an action at law in the District Court on the theory that his intestate's death was caused by respondent's negligence. Upon a verdict of a jury, judgment was entered for petitioner (R. 178). On appeal the Circuit Court of Appeals reversed the judgment of the District Court on the ground that the Jones Act was not meant to cover such a case as the petitioner's because the duty to provide "cure" is a contractual obligation and the nonperformance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act, and further because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service and no liability would exist for injury or death resulting from a failure to furnish such treatment (R. 190-191).

Specification of Errors.

The Circuit Court of Appeals erred

(1) In holding that the failure to perform, or negligent performance of, the duty to provide "cure" to a seaman can not be deemed "negligence" within the meaning of the Employers' Liability Act which, by incorporation into the Jones Act, is made applicable to seamen;

(2) In holding that because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service and injury or death resulting from a failure to furnish such treatment would not give rise to a tort, injury or death resulting from the failure to furnish such treatment to a seaman would not be considered a tort under the Employers' Liability Act; and

(3) In failing to hold that the breach of the duty to provide cure to a seaman is essentially a tort and can be deemed "negligence" within the meaning of the Employers' Liability Act, or even assuming that the duty is contractual, that a breach of the duty may give rise, since the enactment of the Jones Act, to a cause of action for breach of contract and also a cause of action in tort for negligence.

Summary of Argument.

I. Unquestionably in the case at bar there was a "personal injury" within the meaning of the Jones Act. The Circuit Court of Appeals held that if a failure to treat a seaman aggravates the disease he

suffers, the aggravated condition would be a "personal injury."

Because the duty to provide cure to an injured or ill seaman has been termed a contractual obligation, although the duty is imposed by operation of law and grows out of the personal indenture created by the relation of the seaman to his vessel, the Circuit Court of Appeals has erroneously held that a breach of the duty cannot be deemed "negligence" within the meaning of the Employers' Liability Act, which by incorporation into the Jones Act is made applicable to seamen. The duties imposed by operation of law on employers on land, including railway carriers, also grow out of the master-servant relation and are implied in the contract between them. Nevertheless, the breach of any of those duties is deemed negligence, and in the case of the railway carrier the breach is deemed negligence within the meaning of the Employers' Liability Act. No difficulty whatever has arisen with regard to whether the breach should be called a tort or a breach of contract.

The courts have found no difficulty in holding that the negligent failure of the officers or crew of a ship to save a seaman who has fallen overboard through his own negligence, or without fault attributable to the officers or crew, is a tort and can be deemed negligence within the meaning of the Employers' Liability Act. Clearly such a duty is imposed by operation of law and grows out of the personal indenture created by the relation of the seaman to his vessel.

To prevent a recovery under the Jones Act by a seaman, or his personal representative, for a personal in-

jury or death resulting from the breach of the duty to provide cure because the duty is academically called contractual, would not only cause the protection given to seamen engaged upon the same maritime duties to vary with a difference in names given to the obligations imposed upon the ship, without regard to the seaman's need of protection or the diligence of the ship for the safety of its crew, but would also be an undue and unsound restriction of the meaning of "negligence," which Congress never intended. This Court has repeatedly held that the purpose of the Employers' Liability Act was to stimulate carriers to greater diligence for the safety of their employees and that the act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning.

The Employers' Liability Act denounces all contracts, rules and regulations calculated to exempt an employer from liability created by the act. That provision will be nullified by the courts themselves to the extent of liability in situations as in the case at bar, if the judgment of the Circuit Court of Appeals is affirmed.

The Circuit Court of Appeals erred in assuming that the only duties whose breach by a ship create liability under the Employers' Liability Act are those duties imposed on railway carriers and whose breach create liability under the Act. The relations between a railway carrier and an employee are so patently and fundamentally different from the relations between a vessel and a seaman that it is obvious that the duties arising by virtue of those relations are not and cannot

be identical. When the Employers' Liability Act was incorporated into the Jones Act, certainly Congress intended the railroad act to apply to duties imposed on vessels and did not intend that the act be restricted to those duties imposed on railway carriers, the sole employers included in the act when it was enacted. Clearly the Employers' Liability Act, insofar as the Jones Act is concerned, must be interpreted anew in the light of maritime conditions and duties.

Furthermore, at common law, employers, including railway carriers, were under a duty to provide emergency medical aid to an employee who sustained serious injury or illness and who was incapable of caring for himself. The employer also was under the duty of exercising care if he assumed to aid an injured or ill employee even though he had been under no original duty to furnish such aid. Breaches of these duties are torts and can be deemed "negligence" within the meaning of the Employers' Liability Act. It would be anomalous and unsound to hold that a breach of the same duties, in connection with an injured or ill seaman, would be a breach of contract and not "negligence."

II. Assuming that the duty to provide cure may be contractual, nevertheless a willful failure to perform the duty, or negligently performing the same, may be a tort as well as a breach of contract. Many cases and text writers support the proposition that frequently the foundation of an action springs out of privity of contract between the parties, but in which the remedy for the breach may be either contract or tort. The

case at bar seems to be a perfect example of such a case, where either remedy may be pursued.

III. The proofs clearly show that the death of petitioner's intestate was caused by respondent's breach of its duties. Nevertheless, it was unnecessary for petitioner to establish that the intestate's death was caused exclusively by the negligence of respondent, for the Employers' Liability Act provides that the personal representative of a deceased employee may recover if death results *in whole or in part* from the negligence of any of the officers, agents, or employees of the carrier.

The jury's verdict should not be disturbed because the evidence shows beyond dispute that respondent's breach of its duties accelerated the death of petitioner's intestate. Furthermore, where there is any evidence tending to raise an issue of fact as to the causal relation between the injury sued upon and the want of care on the part of either party, it is a question for the jury. It was for the jury to decide whether or not the intestate could have been saved if due diligence had been used.

ARGUMENT.

I.

The failure to provide "cure" to a seaman, or the negligent performance of the duty, resulting in "personal injury," is "negligence" within the meaning of the Employers' Liability Act.

The Jones Act provides that the personal representative of a seaman, who dies from "personal injury"

suffered in the course of employment, may maintain an action for damages at law. The Circuit Court of Appeals definitely held that if a failure to treat a seaman's illness aggravates the disease, the aggravated condition is a "personal injury" within the meaning of the Jones Act (R. 190). The court stated that analogies might be found in decisions under compensation statutes where acceleration of a pre-existing disease resulting in death was held to come within the term "injury".

The Jones Act further provides that in an action by the personal representative of a seaman all statutes of the United States conferring or regulating the right of action for death of railway employees shall be applicable. The statutes referred to are the Employers' Liability Act and its amendments (*supra*, p. 3).

The Circuit Court of Appeals held that the duty to provide "cure" is a contractual obligation; that nonperformance of a contractual obligation is not "negligence" within the meaning of the Employers' Liability Act; and that, therefore, the Jones Act does not cover such a case as the petitioner's.

By such a decision, the Circuit Court of Appeals is unreasonably restricting the scope of the meaning of "negligence" as used in the Employers' Liability Act and is also unduly restricting the rights of a seaman who has suffered "personal injury", within the meaning of the Jones Act.

The duty to provide maintenance and cure may be *called* a contractual obligation, but that is merely academically calling the duty a name. The duty is im-

posed by operation of law and "grows out of that which was termed in the *Montezuma* (C. C. A.), 19 F. (2d), 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel" (*Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 137; 49 S. Ct. 75, 77). The duties imposed upon a railway carrier in connection with an employee also grow out of the contractual relation between them and might just as validly be called contractual obligations. It is obvious that without the contract there would not be the duty.

In this connection see *Elliott on Railroads* (3rd Ed.), Vol. 4, Sec. 1821, where the author says:

> "The foundation of the employer's duty is a contract of service creating the relation of employer and employee. The contract may create express duties and there are always implied duties."

In a footnote (f. n. 6) to the text in this section, the writer states:

> "The cases holding the employer liable for a failure to exercise ordinary care in furnishing a safe place in which to work and safe appliances with which to work, are familiar examples of implied duty growing out of the contract of service" (citing cases).

In *Meador* v. *Lake Shore & Mich. S. Ry. Co.,* 138 Ind. 290, 37 N. E. 721, the plaintiff sued for injury sustained in the course of his employment on the ground that the defendant was negligent in furnishing a proper ladder for plaintiff's use in his work. The court, in discussing the right of the plaintiff to bring the action, said:

> "It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient, properly constructed, and safe machinery, or other materials and appliances to be used in the course of his employment and necessary for the service" (p. 293).

In *Stafford* v. *Baltimore & O. R. Co.* (D. C. W. Va.), 262 Fed. 807, a brakeman sued the railroad company for personal injury. A plea alleging that the plaintiff, being over the age prescribed and unable to pass the physical examination required by defendants' rules, procured another who was competent to make application and take the examination and, by means of the certificate so obtained, fraudulently secured the position, was held good on motion to strike. This decision was based on the ground that there was not a master-servant relationship between plaintiff and defendant and that plaintiff, therefore, did not have the rights of a servant even though he worked for the company.

The protection the law seeks to give to an employee, especially to a seaman who requires it most, should not be denied and the statute providing a remedy unduly narrowed by technical and mere formal distinctions in nomenclature.

The Circuit Court of Appeals for the Fourth Circuit, in *Harris* v. *Pennsylvania Railroad Company,* 50 F. (2d) 866, has decided that a negligent breach of a duty, *implied in the contract of employment,* does permit a recovery under the Jones Act. The decision in that case, it is submitted, is more reasonable and more consistent with the beneficent results intended to be

created by the enactment of the Jones Act than is the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

In the *Harris* case, *supra*, the Circuit Court of Appeals reversed a judgment for the defendant, entered upon a directed verdict of the District Court, in an action at law by the administratrix of the estate of Harris, against the Pennsylvania Railroad Company to recover damages for the intestate's death while in the defendant's employ as a deckhand on one of defendant's car-floats.

While engaged in the performance of his duties, the intestate fell overboard and was drowned. The evidence disclosed that the members of the crew might have saved him had they used due diligence.

Two main questions were presented on the appeal:

> "(1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness, and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this duty be found to exist, whether there was negligence on the part of the crew in failing to perform it" (pp. 867, 868).

The court answered the first question in the affirmative, saying:

> "* * * we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost" (p. 868).

On the second question the court said, page 869:

> "We think also that the evidence was sufficient to justify the submission to the jury of the issue of negligence."

After reviewing the evidence in connection with the acts of the members of the crew to save the seaman, the court said:

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used" (p. 869).

It is obvious from this opinion that the court considered the Jones Act broad enough to permit a recovery by an administrator where the jury finds that the crew of a vessel negligently failed to perform its duty to care for a seaman or extend aid to him in an emergency, even though the duty may be implied in the contract of employment. The court branded the failure to perform such an implied duty "negligence" within the Employers' Liability Act in so far as it is made applicable to seamen.

In its opinion the court referred to *Salla* v. *Hellman* (D. C. Cal.) 7 F. (2d) 953. In that case it was held that the failure of the captain of a boat to attempt to rescue a member of a crew known to have fallen overboard was "negligence".

These cases cannot be distinguished from the case at bar on the ground that they are "accident" cases. The fact remains that the court imposed a duty upon the ship to use every reasonable means to save the

life of a seaman in an emergency, even though the emergency was not created by any fault of the ship, its officers or its crew. In the *Harris* case, *supra,* the court stated that the duty of the ship to use due diligence to save one of the crew, *both in the case of illness or injury and in the case of a seaman falling overboard*

> "* * * is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right" (pp. 868, 869).

This part of the opinion is not quoted in an attempt to assert that the doctrine of maintenance and cure was involved in the case, nor that the duty was identical with the duty imposed in the case at bar, but it does show that the duty, which was not performed in the *Harris* case, is as much contractual as the duty which was negligently performed in the case at bar. The significance of that quotation is that the court was not deterred from permitting a recovery under the Jones Act by the mere fact that the duty to render aid in the emergency might academically be called a contractual obligation. The emphasis was placed on the *saving* of the seaman when he needed assistance, as it should have been, and not on the particular type of situation which put the man in danger. To place the emphasis on the type of situation arising, rather than the personal injury resulting from the failure to

perform a duty, would lead to all manner of absurdities.

In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19, Mr. Justice Holmes, in referring to injuries suffered by a longshoreman employed by a stevedore, said (p. 52):

> "But words are flexible * * *. We can not believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by a ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business * * *. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act * * *."

Nor does it seem reasonable that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the difference in the names given to duties imposed upon the ship, whose nonperformance result in personal injury to the seaman. It would be difficult to imagine that Congress intended that a sailor who steps into an open hatch that had been carelessly left open should have a remedy under the Jones Act, but a seaman who becomes desperately ill and secures no care or receives negligent treatment from the officers, who know of the seaman's condition and clearly know their duty, should

not be allowed to recover under the Jones Act; or that Congress intended to permit the representative of the sailor who fell through the open hatch, if his fall resulted in death, to recover damages under the Jones Act, but not the personal representative of the seaman who became desperately ill and was not given any care or was negligently treated by the officers, so that death resulted.

In *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 Sup. Ct. 440, it was held that willful assault on a longshoreman by a foreman was negligence within the Employers' Liability Act.

Holding that a failure to perform or a negligent performance of the duty to provide cure, resulting in a personal injury to a seaman, is negligence within the meaning of the Employers' Liability Act, is no more unreasonable nor a widening of the scope of the meaning of the word "negligence" than the holding that willful assault is negligence within the meaning of that act. The holding of the former would clearly further the purposes for which the act was enacted. Mr Justice Butler in the *Jamison* case, *supra,* said the following (p. 640):

> "The act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress, is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. * * *"
>
> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be con-

> strued liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. *Miller* v. *Robertson,* 266 U. S. 243, 248, 250, 45 S. Ct. 73, 69 L. Ed. 265."

Section 5 of the Employers' Liability Act makes void all contracts, rules and regulations calculated to exempt an employer from liability created by the act. The Circuit Court of Appeals in the case at bar has, in effect, gone farther than an employer could go to exempt himself from liability created by the act, since the Court has exempted an employer from liability by technically maintaining that a duty implied by law is contractual and outside the meaning of the word "negligence" as used in the act.

The Circuit Court of Appeals further reasoned that the non-performance of the duty to provide cure is not "negligence" within the meaning of the Employers' Liability Act because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for death resulting from the failure to furnish such treatment. The Court further stated that if such a duty were assumed by contract, it does not think that failure to act in performance of the contract would give rise to any liability under the Employers' Liability Act (R. 191).

Assuming that the Court's statement is correct, it does not follow that under the Jones Act, which has incorporated the Employers' Liability Act, there can be no recovery for willful failure to provide medical

attention or for negligent conduct in furnishing cure to a seaman when the law has imposed upon a vessel and owner such a duty.

Since the relations between a railroad carrier and an employee are so patently and fundamentally different from the relations between a vessel and a seaman, it follows that the duties arising by virtue of those relations are not and cannot be identical. The two fields of law, in connection with these two wholly dissimilar master-servant relations, have developed along different lines. As stated by the Court in the *Harris* case, *supra* (p. 868):

> "There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. * * * If he is taken sick or is injured on board the ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land."

It is obvious that the Employers' Liability Act was specifically designed by Congress to apply to conditions as they obtain on railroads. The difficulty now appears to be to relate such a statute, not specifically designed to apply to any other conditions, to conditions obtaining on navigable waters. It is reasonable

to assume, therefore, that when the Employers' Liability Act was incorporated into the Jones Act, it was intended to apply to the peculiar situations arising and duties applying on navigable waters, and not to those situations arising or duties applying in railway cases. To make sense, it must be construed and interpreted in the light of existing *maritime law*—not railroad law. Petitioner submits that the Circuit Court of Appeals erred in assuming that the only duties whose breaches create liability under the Jones Act are those arising by virtue of the master-servant relation on railroads.

Although it may be true that there is no general duty resting upon a railroad to provide medical attendance upon an employee, during incapacity, who becomes ill in the course of his employment (obviously because there is no necessity for imposing such a duty upon the master in the case of employment on land), nevertheless, when in the course of his employment, a servant sustains serious injury or illness and is in a helpless condition so that he is incapable of aiding himself, creating an immediate and urgent need for medical attention to save his life, it is the common-law duty of the master, including especially railroads, to provide such emergency medical aid, and for negligence in providing such aid or negligent non-performance of his duty, the master is liable for damages in case death ensues as the proximate result of such negligence. The authorities make no distinction in cases where the primary injury or illness occurred without negligence on the master's part. See *Atchi-*

son, T. & S. F. Ry. Co. v. *Hix* (Tex. Civ. App.), 291 S. W. 281, 284.

In *Baker* v *Adkins* (Tex. Civ. App.), 278 S. W. 272, an action was instituted by an administratrix against the receiver of the International and Great Northern Ry. Company and the railway company itself for damages suffered as the result of the death of the deceased, caused by the receiver's alleged negligence. The complaint alleged that the deceased, while working on the railway, was stricken with smallpox; that he was placed in a car which had been used by employees as sleeping quarters and that he remained there until his death, which was brought about by the defendants' negligence in not giving him proper treatment; that the car became very insanitary and unclean; and that other wrongful acts of the defendants greatly aggravated his illness. The cause was submitted to a jury through special issues, all of which were answered favorably to the plaintiff. The Court then rendered judgment in favor of plaintiff.

On appeal, the Court of Civil Appeals held that: (1) it approved the doctrine that a railway company was under a duty to care for an employee suddenly stricken ill or injured while serving his master; and (2) since the railway company assumed the duty of caring for the deceased, it should have done so in a reasonably careful and competent manner,

> "and if negligent cannot hide itself behind the cruel plea of such care being outside of its chartered duties" (p. 276).

In *Carey* v. *Davis et al.*, 190 Iowa 720, 180 N. W. 889, the plaintiff alleged that he was overcome by heat while

working for the defendants as a farm laborer; that the defendants laid him in a wagon box at or near the place where he had been at work; and that they left him there in an even more exposed condition, without care or protection, for a period of four hours or more. Plaintiff charged defendants with negligence in *failing* to give him reasonable care and in aggravating his suffering by exposing him to the rays of the sun. No claim was made that plaintiff's prostration was caused by the negligence of defendants.

Defendants demurred on the ground that there was no actionable negligence on their part and no duty to give relief. The demurrer was sustained in the District Court and judgment entered in defendants' favor. On appeal to the Supreme Court the judgment was reversed.

In its opinion the court said (p. 723):

> "* * * there is a tendency of the courts to hold that where, in the course of his employment, a servant suffers serious injury, or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the master, if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency."

In *Northern Central Railway Co.* v. *The State, etc.*, 29 Md. 420, the plaintiff sued for the benefit of the next of kin of a deceased person, who was hit by a train of the defendant at a crossing. After the accident the

deceased was put in a warehouse, which was then locked. The next morning it was found that the injured person had recently died, as he was still warm, and that during the night he had moved from the place where he had been laid. The court held that the railroad's conduct constituted gross negligence on the ground that when the injured person was found, whatever the cause of the collision may have been, it thereupon became the duty of defendant's agents to remove him and to do it with proper regard for his safety. The judgment for plaintiff was affirmed.

See also: *Troutman's Adm'x* v. *Louisville & Nashville R. Co.*, 179 Ky. 145, 200 S. W. 488; *Terre Haute & Indianapolis R. Co.* v. *McMurray*, 98 Ind. 358; *Raasch* v. *Elite Laundry Co.*, 98 Minn. 357, 108 N. W. 477; *Pullman Co.* v. *Montimore*, 17 F. (2d) 2 (C. C. A., 5th), certiorari denied 274 U. S. 746, 47 S. Ct. 659; *Fontanella* v. *N. Y. Cent. R. Co.*, 186 App. Div. 588, 174 N. Y. S. 537, Aff'd, 228 N. Y. 546.

In the *Troutman* case, *supra*, the court, in discussing on what ground to rest the liability of the master in cases like these, said the obligation grows out of the *relation of master and servant* (p. 156).

Furthermore, even if the master is not under an original obligation to give medical attention or treatment to an injured or sick employee, if he undertakes in an emergency the relief of a sick or injured employee, he is bound to exercise reasonable care so that the sickness of or injury to the employee shall not be increased and his life endangered. See *Atchison, T. & S. F. Ry. Co.* v. *Hix*, *supra* (p. 284).

In *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708, 77 S. E. 324, the plaintiff was injured while in the employ of the defendant and sought recovery for injury sustained through the negligence of a person employed by defendant to attend and treat him. Plaintiff alleged an express contract whereby the defendant, in consideration of monthly deductions from plaintiff's wages, agreed in the event of sickness or accident to furnish for plaintiff's treatment a skilled physician. Plaintiff alleged that defendant failed to furnish a skilled physician to treat him but did furnish a person who so unskillfully and negligently conducted himself that plaintiff's injuries were aggravated. Defendant's demurrer was sustained by the lower court. On appeal the Supreme Court of Appeals reversed.

The main question was whether or not plaintiff elected an improper form of action, having sued in tort. The court first found that plaintiff set out a cause of action, taking the facts to be true as alleged, because there is a liability on the employer unless, in pursuance of its undertaking, it exercises reasonable care. The court then held that plaintiff could sue in tort or in contract—in tort because negligence was the proximate cause of the injury.

In *Crawford* v. *Davis, Director General*, 136 S. C. 95, 134 S. E. 247, the plaintiff sued for personal injuries suffered through the negligent treatment of a physician to whom plaintiff was sent by a foreman of the Southern Railway Company after plaintiff had been injured in the course of his employment. There was no question in the case as to negligence in connection with the

original injury. Judgment for plaintiff was affirmed on the ground that an employer undertaking to care for an injured employee, where no duty exists to do so, is bound to the same measure of care as if the duty existed.

See also *Karabalis* v. *E. I. DuPont de Nemours and Co.*, 129 Va. 151, 105 S. E. 755.

It seems clear that the master's negligent failure to perform the common-law obligations to furnish emergency treatment to an injured or ill employee suffering such illness or injury in the course of his employment, although without negligence on the part of the employer, and the master's failure to act carefully when he has undertaken to treat the injured or ill employee, is "negligence" within the meaning of the Employers' Liability Act.

In *Crawford* v. *Davis, Director General, supra,* the act of the defendant complained of was considered an act without any elements of interstate commerce and therefore it was stated that the Federal Employers' Liability Act was not applicable. However, the court did say (p. 108):

> "It may be stated further that, even if the case were under the Federal Employers' Liability Act, the result would not be different; for, as stated in the citations *supra,* the Act is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein. 'The words "suffering injury" are not confined to injuries which are attended with force or violence, etc.' "

In *Atchison, T. & S. F. Ry. Co.* v. *Hix, supra,* the court said (p. 284):

> "Appellant's first insistence is that there can be no recovery, under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries resulting in death, the employer not being liable for the primary injury.
>
> "This question, under the Federal Employers' Liability Act, has never been passed upon so far as we are advised, but has been considered in a number of cases by state courts in cases arising under the death by wrongful act statutes of such states."

The court then states the two common-law duties of a master to furnish medical attention in an emergency to an injured or ill employee and to act with reasonable care if the master undertakes the relief of a sick or injured employee, citing cases in support thereof. The court then continues (p. 284):

> "In our opinion there is nothing in the language of the Federal Employers' Liability Act which excludes the application of these two grounds of liability in the case of an employee injured while engaged in interstate commerce. There being no ruling by the Federal courts upon the question, we are at liberty to hold and do hold that such liability attaches to the master in a proper case arising under the act."

In *De Atley* v. *Chesapeake & Ohio Ry. Co.,* 201 Fed. 591 (D. C. Ky.) it was held that the Employers' Liability Act covers any and all negligent acts for which

a carrier could be liable to an employee under the common law.

Thus, in view of the above, we should then have the patent and unsound anomaly of permitting the railway employee or his personal representative to recover damages for the carrier's negligence within the meaning of the Employers' Liability Act and the denial of such a recovery, under the Circuit Court of Appeals' ruling, to a seaman injured in the same way, and this for no other reason than that the cause of action in the case of the railroad employee is rightfully considered a tort but in the case of a seaman the cause of action is academically considered in contract, although unquestionably both duties which were negligently performed, giving rise to the causes of action, grew out of the master-servant relationship.

It is obvious that every remedy given to a seaman under the Jones Act arises by virtue of the contractual relation. The following quotation is from *Benedict on Admiralty* (5th Ed.), Vol. 1, Sec. 25, p. 32, referring to the Jones Act:

> "* * * assuredly the intention of Congress was to annex the remedy to the contract of employment and not to confine it, as if independent of contractual relation, within the bounds of maritime tort, particularly as the remedy is given at law."

II.

Assuming that the duty to provide cure may be contractual, nevertheless a willful failure to perform the duty, or negligently performing the duty, may be a tort as well as a breach of contract.

There is abundant authority for the proposition that a tort may grow out of or be coincident with a contract.

In *Neil* v. *Flynn Lumber Co., supra,* where the plaintiff recovered in tort for negligent treatment of his injury, the treatment having been furnished pursuant to a contract between the employer and employee, the court reviewed many cases from several jurisdictions holding that the plaintiff could sue either in contract or tort. In this connection the court said (p. 715):

> "In a large class of cases, embracing carriers of passengers and goods, telegraph companies, and all contracts of service, professional or otherwise, there is a duty implied by law to exercise the commensurate degree of care required, a breach of which entails liability either on contract or in tort. In these cases, as in the one at bar, negligence is the proximate cause of the injury."

In *Boorman* v. *Brown,* 3 Q. B. 511, 2 G. & D. 793, 114 Eng. Reprint 603, Aff'd 11 Cl. & F. 1, 8 Eng. Reprint 1003, the plaintiff sued the defendant, who had been hired as broker and to whom plaintiff had consigned goods for delivery to a third person under a contract of sale, in tort, alleging that defendant was

under a duty to use reasonable care that the goods should not be delivered to the purchaser without the price being paid to defendant according to the contract, but that by defendant's carelessness the goods were delivered without the price being paid. After a verdict for plaintiff, the Court of Queen's Bench arrested judgment, which was reversed by the Court of Exchequer Chamber on the ground that for the breach of such a duty an action of tort lay.

Tindal, C. J., speaking for the court, said (pp. 525, 526):

> "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed, * * * and, as to the objection that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance * * *."

After giving examples where tort lay for nonfeasance, the court continued:

> "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."

In discussing how the duty arose, the court said (p. 527):

> "* * * the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration."

In *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.* (C. C. A. 1st), 240 Fed. 573, the plaintiff sued the defendant insurance company in tort for the recovery of damages caused plaintiff by the negligent defense by the insurance company of the action instituted by one of plaintiff's employees for damages suffered as the result of an injury sustained in plaintiff's plant.

The relationship between the parties giving rise to the tort complained of was established by the contract of insurance, several provisions of which plaintiff pleaded. The defendant contended that the cause of action was in contract and not in tort. The Circuit Court overruled that contention, saying in part (p. 579):

> "The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law."

As in the above case, last cited, the relationship between the parties in the case at bar was created by contract out of which grew duties imposed by law, which respondent was "bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law." A failure to use due care in the performance of those duties or a willful failure to perform them clearly constitutes "negligence" or a tort.

In *The Western States* (D. C. N. Y.), 151 Fed. 929 (aff'd 159 Fed. 354), the court said (p. 930):

> "The law is unquestionably well settled that the carrier, in addition to the obligations above mentioned which it owes to the passengers, must also use the utmost care to accord to a passenger respectful treatment by its officers and servants. Upon the facts elicited, the jury was warranted in finding that after the assault the libelant, who made report thereof to the master of the vessel and to the special watchman, was treated disrespectfully. The skeptical manner in which her complaint that she had been chloroformed, assaulted, and robbed was listened to, together with the evident lack of sympathy displayed, without doubt augmented her sufferings. *Such tortious acts following the assault upon her were a breach of the contract, and were properly considered by the jury in aggravation of damages.* The *La Gascogne* (D. C.), 135 Fed. 577; *The Willamette Valley* (D. C.), 76 Fed. 838; *Gillespie* v. *Brooklyn Heights R. R., supra.*" (Italics ours.)

In *Dean* v. *McLean,* 48 Vt. 412, it was held that the defendant who had contracted for running his logs over plaintiff's mill-dam and had agreed to repair and pay all damages done, might be sued in case for negligent injury to the dam.

In *Lane* v. *Boicourt,* 128 Ind. 420, 27 N. E. 1111, it was held that for malpractice by a physician an action in either contract or tort would lie.

The case of the common carrier furnishes the most conspicuous illustration of liability in tort or contract through a failure to perform duties which have arisen by virtue of the relations created by contract. A passenger injured as a result of the carrier's negligence may sue in tort or in contract for a breach of the contact of carriage. See *Gillespie* v. *Brooklyn Heights R. R. Co.,* 178 N. Y. 347, 70 N. E. 857; *Busch* v. *Interborough R. T. Co.,* 187 N. Y. 388, 80 N. E. 197.

See also:

Owens Bros. v. *Chicago, R. I. & P. Ry. Co.,* 139 Iowa 538, 117 N. W. 762;

Flessher v. *Carstens Packing Co.,* 93 Wash. 48, 160 P. 14;

Franklin Fire Ins. Co. of Philadelphia v. *Weinberg,* 110 Misc. 644, 181 N. Y. S. 15;

Cooley on Torts, 4th Edition, Vol. 1, Sec. 60.

Although the duty to provide cure may be called a contractual obligation, it is a duty implied by law growing out of the master-servant relationship, and, in view of the above decisions, a failure to perform the duty or careless performance of the same may

give rise to a tort action as well as an action for breach of contract. Furthermore, the contractual relation between the ship and the seaman and the imposition of the duty to provide cure gives rise to the additional duties, since the enactment of the Jones Act, to give to a seaman medical attention if he becomes seriously ill or injured and to act with due care once the officers of the vessel have assumed to act, and the breach thereof is "negligence" within the meaning of the Employers' Liability Act.

III.

The proofs clearly show that the death of petitioner's intestate was caused by respondent's breach of its duties.

It may be assumed that in the jury's opinion petitioner has proved that respondent's nonfeasance and misfeasance were the proximate cause of the death of petitioner's intestate.

The Circuit Court of Appeals, while assuming for the purpose of its discussion a causal relationship between respondent's failure to perform its duties and the seaman's death, since it was unnecessary for the court to review the question of proximate causation in view of the fact that the court reversed the judgment of the District Court on other grounds, nevertheless did say that

> "• • • we must take it that the defendant failed to give Santiago the care he should have been given during his illness. The evidence would not, in our opinion, sustain a verdict

> based on the theory that any affirmative acts of the defendant's agents caused his death, but it might justify a finding that the defendant omitted performance of its maritime duty to provide 'cure' to the sick seaman, in that it failed to land him at some port on the voyage north, or to furnish more expert medical treatment on board, or to get him promptly to a hospital on arrival of the vessel at the port of New York" (R. 188-189).

It is almost impossible to imagine a case where greater negligence and causal relationship between the negligence and a seaman's death could be shown. This Court, in *The Iroquois,* 194 U. S. 240, 24 S. Ct. 640, made clear what the duties of a ship to its seamen are in cases such as the one at bar. In that case, this Court held that it was negligence not to divert the ship six hundred miles off its course with a week's sacrifice of time so as to call at Valparaiso on the ship's voyage around the Horn to San Francisco, in order to obtain hospital aid for a seaman who had suffered a fractured leg.

Mr. Justice Brown, on pages 246, 247, said:

> "We have no criticism to make of the treatment of libelant immediately following the injury, except that we think he should have been taken into the cabin, where he could have been more comfortably provided for. * * * It is true the libelant said the bones were not united, but he does not seem to have complained of this to the master; yet with a careful examination, such as the master was bound to

> make, we think he should have detected it. * * *
> "* * * He was a boy, largely ignorant of his rights and duties. The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not. * * * To put it in a light most favorable to the master, he speculated upon the chance that the union of the bones had taken place without seeking to inform himself of the fact. The courts below held that the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libelant imposed upon him."

It follows that in view of the facts and the opinion of this Court in the *Iroquois* case, *supra,* there can be no question regarding the gross negligence of the ship's officers and crew in the case at bar resulting in "personal injury" and death of the deceased.

It is clear that petitioner's intestate's death was caused in whole or in part by respondent's negligence. The Employers' Liability Act provides that the carrier shall be liable in case of the death of an employee to his personal representative for

> "* * * death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier * * *." (Italic ours.)

If the injury or death was caused "in whole or in part" by the employer's negligence, the statute cannot be nullified and the right of recovery defeated by call-

ing a plaintiff's act the proximate cause of the injury.

Illinois Central R. Co. v. *Skaggs,* 240 U. S. 66, 36 S. Ct. 249;

Spokane & I. E. R. Co. v. *Campbell* (C. C. A. 9th), 217 Fed. 518.

The jury's verdict shows that to their minds there was a causal relation between respondent's negligence and the death of petitioner's intestate. The verdict should not be disturbed, because where there is any evidence tending to raise an issue of fact as to the causal relation between the injury sued upon and the want of care on the part of either party, it is a question for the jury.

Minneapolis, St. P. & S. S. M. Ry. Co. v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129;

Dahlen v. *Hines* (C. C. A. 7th), 275 Fed. 817.

In the *Harris* case, *supra,* the Circuit Court of Appeals, in reviewing the correctness of the lower court's refusal to send the case to the jury, said, after a discussion of the facts of the case (p. 869):

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used."

It is clear that in the case at bar it was also for the jury to decide whether petitioner's intestate could have been saved if due diligence had been used.

CONCLUSION.

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

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